

Editor's note: appeal filed sub nom. Mary Akootchook v. United States, Civ. No. A98-0126 (D. Alaska April 22, 1998); dismissed, (claims barred by res judicata effect of two class actions) (Nov. 2, 1999); relief from judgment denied, (Feb. 1, 2000); appeal filed, No. 00-35235 (9th Cir. April 3, 2000), aff'd (Nov. 8, 2001), 271 F.3d 1160.

LOANN M. SMITH (HEIR OF NELLIE SMITH)

IBLA 94-340

Decided December 3, 1997

Appeal from a Decision of the Alaska State Office, Bureau of Land Management, rejecting a Native allotment application. F-14668 (parcel A).

Vacated; case remanded.

1. Alaska: Native Allotments--Segregation--Small Tract Act: Classification

An order classifying land for disposition under section 1 of the Small Tract Act, as amended, 43 U.S.C. § 682a (1970) segregates the land from entry under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) until the order is modified or cancelled.

2. Alaska: Native Allotments

The Board will order the initiation of a Government contest where there is a substantial question of fact as to whether, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), and its implementing regulations, a Native allotment applicant initiated independent use and occupancy of land prior to its segregation from entry.

APPEARANCES: Marlyn J. Twitchell, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for Appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

LoAnn M. Smith (Appellant), the daughter and sole heir of Nellie Smith, has appealed from a Decision of the Alaska State Office, Bureau of Land Management (BLM), dated January 18, 1994, rejecting Native allotment application F-14668 as to parcel A.

Nellie Smith's Native allotment application, F-14668, was originally filed with BLM on December 1, 1971, pursuant to the Act of May 17, 1906 (the 1906 Act), as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). She sought about 13 acres of land in two parcels (A and B) in protracted sec. 4, T. 18 S., R. 7 W., Fairbanks Meridian, Alaska, about 2 miles east of the town of Cantwell, Alaska. Parcel A, which encompassed 3.93 acres, had already been surveyed as lot 19 of U.S. Survey No. 3229, Alaska, and was so described in the application. Parcel B, which was said to encompass about 9 acres, was described by metes and bounds. This case involves only parcel A.

Smith, who was born on January 24, 1948, claimed use and occupancy dating from June 1965 in her application. She stated that she had used and occupied the land each year, during the months from June through December, for cutting wood, hunting, and trapping, and that she had cleared the land and erected a building, valued at \$400, in 1965.

The land sought by Smith in parcel A was included by BLM in Small Tract Classification Order No. 80 (the April 1954 Order), which was issued on April 5, 1954. 19 Fed. Reg. 2097 (Apr. 10, 1954). Effective April 28, 1954, the April 1954 Order classified the land as suitable for disposal under section 1 of the Small Tract Act, as amended, 43 U.S.C. § 682a (1970), (repealed pursuant to section 702 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787, 2789) and remained in effect until it was cancelled by BLM on January 31, 1969. In addition, on January 17, 1969, the Secretary issued Public Land Order No. 4582 which withdrew the land at issue from all forms of appropriation under the public land laws, subject to valid existing rights. See 34 Fed. Reg. 1025 (Jan. 23, 1969). That withdrawal remained in effect until December 18, 1971, when it was revoked by section 17(d)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(d)(1) (1994).

Smith died on July 2, 1972. On June 20, 1973, John Tiffany, a BLM realty specialist, accompanied by Henry Peters, Smith's uncle and chief of the Native village of Cantwell, inspected parcel A. (Land Report, dated Mar. 6, 1974, at 3.) He found that the parcel had been partially cleared and a rough driveway had been created by a bulldozer but was not graveled. Tiffany reported that, according to local residents, Smith had, before her untimely death, cleared the land in anticipation of moving a plywood cabin, which had mistakenly been placed on another nearby parcel, onto the land. Id. at 3, 4. He further reported that Peters stated that Smith had "never resided or lived upon Parcel A." Id. at 4. Tiffany recommended that BLM reject Smith's application for that parcel because her reported use and occupancy did not begin until after the land had been segregated from entry and appropriation by the April 1954 Order.

By memorandum dated February 4, 1976, BLM notified the Bureau of Indian Affairs (BIA) that it had decided to take adverse action against

Smith's application based on its findings that Smith had not complied with the use and occupancy requirements of the 1906 Act, and in any case, her claimed use and occupancy did not predate the April 1954 Order segregating the land. However, BLM withheld action for 60 days to permit the submission of additional information in support of Smith's application. (Memorandum to Realty Officer, BIA, from Chief, Lands and Locatable Minerals Section, Alaska, BLM, dated Feb. 4, 1976, at 2.)

The Alaska Legal Services Corporation (ALSC) responded to BLM, on behalf of Smith's heir, on April 1, 1976, submitting seven statements, many of them notarized, of witnesses who attested to Smith's use and occupancy of the subject land. Her mother, who had lived in Cantwell for 61 years, asserted that Smith had started using and occupying the land in 1955 along with various relatives (including her mother, grandmother, uncle, brothers, and sisters), used the land year-round for food gathering and cutting and gathering wood (as well as berrypicking during the summer), and later cleared the land "in 1971." (Statement of Alice Norton, dated Feb. 24, 1976, at 1.) Her older brother, who had lived in Cantwell for 39 years, stated that, to the best of his knowledge, Smith began her use and occupancy "somewhere between 1961 and 1964." (Statement of Bud J. Carlson, dated Feb. 24, 1976, at 2; see also statement of Thomas L. Oliver, dated Feb. 24, 1976, at 2 ("1965"); statement of Douglas Gabby, dated Feb. 20, 1976, at 2 ("1964"); statement of Dorothy Sheldon, dated Feb. 22, 1976, at 2 ("about 1964").) Similarly, Henry Peters stated that "Nellie has used Parcel A of her allotment land ever since 1963 or 1964." (Affidavit of Peters, dated Mar. 4, 1976.)

The ALSC later provided an Affidavit in which Smith's sister (Maggie Oliver) described, at some length, Smith's use and occupancy of the land in parcel A and stated that "around 1959 or 1960--she began use of the land on her own." Oliver noted that she and Smith "were equally sharing and contributing in the subsistence activities of our family by our early teenage years." (Affidavit of Oliver, dated Apr. 5, 1976, at 1-2.)

In its January 1994 Decision, BLM rejected Native allotment application F-14668 as to parcel A, because Smith's reported use and occupancy did not cover any period of time when the land was available for entry under the 1906 Act. In its Decision, BLM relied on the initiation of use and occupancy in June 1965, as Smith had initially reported in her application, noting that it was not before the April 1954 Order and the subsequent actions that precluded entry under the 1906 Act.

In her statement of reasons for appeal (SOR), Appellant contends first that the April 1954 Order did not preclude Smith from initiating qualifying use and occupancy under the 1906 Act, arguing the classification did not constitute a reservation of the land, since the April 1954 Order "did not withdraw the land from sale or settlement nor did it appropriate it for a particular public use." Rather, Appellant asserts that the April 1954 Order "merely identified the land as chiefly valuable for disposal for home sites in tracts of 5 acres or less." (SOR at 4-5.)

In the alternative, Appellant contends that, even if the April 1954 Order precluded qualifying use and occupancy under the 1906 Act during the time it was in effect, "BLM's file contains sufficient evidence to show that Ms. Smith used and occupied the land before Classification Order No. 80 was entered in 1954." (SOR at 7 (emphasis added).) Appellant points to the April 5, 1976, Affidavit of Maggie Oliver, Smith's sister, which, Appellant asserts, is confirmed by more recent statements by members of Smith's family, which are submitted along with her SOR.

Finally, Appellant asserts that, before the Department may finally reject the application, the Board must, in accordance with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), remand the case to BLM for a hearing on the issue of whether Smith initiated qualifying use and occupancy of the land prior to the April 1954 Order.

[1] It is well established that issuance of a small tract classification order segregated the affected land from entry and appropriation under any of the public land laws, including the 1906 Act, unless provision to the contrary was made in the order. Osborne v. Hammit, 377 F. Supp. 977, 982-83 (D. Nev. 1964); Chester C. Reddeman, 101 IBLA 33, 34 (1988), and cases cited. The segregation operated in much the same way as a reservation or withdrawal of the land, precluding entry and appropriation under the public land laws, regardless of whether or not the entry or appropriation was consistent with disposition of the land under the Small Tract Act. Osborne v. Hammit, 377 F. Supp. at 983; Betty J. Thompson, 43 IBLA 174, 176 (1979).

Contrary to Appellant's assertion, the segregation arose even though it might justifiably be said that the land was not "appropriate[d]" to a particular public use, but was simply "identified" for possible future disposal. Moreover, entry and appropriation pursuant to other statutory authority is precluded when the classification order does not expressly permit it. In order to allow such entry, BLM must modify or cancel the order. Thom Seal, 92 IBLA 9, 11 (1986).

In this case, the April 1954 Order did not limit its segregative effect. Nor is there any evidence that the April 1954 Order was modified or cancelled at any time before January 31, 1969, when BLM cancelled the April 1954 Order to permit selection of the affected land by the State pursuant to the Alaska Statehood Act. Thus, the land at issue here was segregated from entry under the 1906 Act, and an Alaskan Native was barred from initiating use and occupancy, until January 31, 1969.

Citing the case of Ruby Tansy, Appellant contends that BLM may approve an application even where use and occupancy was initiated after issuance of a small tract classification order. Appellant asserts that Tansy had filed an application (F-14) on June 29, 1966, in which she sought a small tract of land covered by the April 1954 Order at issue here, and claimed that her use and occupancy began in 1957, when the April 1954 Order was in effect.

Noting that BLM partially cancelled the April 1954 Order on February 20, 1968, in order to accommodate Tansy's claim, approved her application on March 14, 1975, and later conveyed the land to her, Appellant contends that "[t]here is nothing to distinguish that case from Nellie Smith's," and argues that she should be treated the same. (SOR at 6.)

Appellant's argument must be rejected. The factor that distinguishes Tansy's case from Smith's is that BLM held that Tansy had initiated qualifying use and occupancy prior to issuance of the April 1954 Order and the resulting segregation. On April 28, 1954, the effective date of the April 1954 Order, Tansy was almost 11 years old and was found by BLM to be engaging in qualifying use and occupancy as required by the 1906 Act and its implementing regulations prior to that time. See Land Report, dated Feb. 14, 1968 (Ex. F attached to BLM Answer) at 2 ("[A]pplicant indicated she had used and or occupied the area wholly and in part, almost her entire life. There is substantial evidence on the ground to indicate use and occupancy of this area long before it was classified."); Telephone Confirmation, dated June 25, 1990. Thus, the segregation was held not to have attached to the land on April 28, 1954. This was recognized when BLM cancelled the April 1954 Order in order to accommodate Tansy's claim: "Serial No. F-14 * * * has been determined to be a prior valid right predating the classification action." (Ex. 19 attached to SOR.) By contrast, Smith was only just over 6 years old, and the question remains as to whether she was similarly engaged in qualifying use and occupancy prior to April 28, 1954. We now turn to that question.

[2] Section 3 of the 1906 Act, as amended, 43 U.S.C. § 270-3 (1970), provides that, in order to qualify for an allotment, there must be satisfactory proof that a Native applicant has engaged in "substantially continuous use and occupancy of the land for a period of five years." Regulation 43 C.F.R. § 2561.0-5(a) states that such use and occupancy

contemplates the customary seasonality of use and occupancy by the applicant of any land used by h[er] for h[er] livelihood and well-being and that of h[er] family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

We have held that, in accordance with the statute and regulation, where the land has been segregated, reserved, or withdrawn from appropriation under the 1906 Act, there must be sufficient proof that the applicant used and occupied the land as an independent citizen acting on her own behalf and not as a minor child in the company and under the supervision of her parents or other members of her immediate family, thus excepting her claim from the segregation, reservation, or withdrawal. See United States v. Akootchook, 130 IBLA 5, 7, 11 (1994), and cases cited.

We conclude that evidence in the record does not show, by a preponderance, that prior to the April 1954 Order, Smith used and occupied parcel A

as an independent citizen acting on her own behalf. Rather, the evidence shows that she used the land as a minor in the company and under the supervision of her parents or other members of her immediate family.

Even if we ignore Smith's admission on her application that her use and occupancy commenced in June 1965 and accept the additional evidence purporting to show that Smith's use and occupancy commenced prior to April 28, 1954, there is still not sufficient evidence to show that such use was as an independent citizen acting on her own behalf. For example, Maggie Oliver, Smith's sister, admitted in her 1976 statement, that Smith's early use and occupancy was in the company of family members and, further, that it was not until "around 1959 or 1960," after the April 1954 Order, that Smith, who was then 11 or 12 years old, "began use of the land on her own," thus presumably not in the company or under the supervision of her family members. (Affidavit of Oliver, dated Apr. 5, 1976, at 1.) This is not contradicted by any of the recent statements, but rather is supported by them. Carlson, Smith's older brother, stated:

We move[d] to Cantwell in the fall of 1941 [and] lived here ever since about 1/2 mile from where Applicant has applied for land since we were all family * * * [.] She used the land with her mom up until her death * * * [.] [A]ll of us use it for livel[i]hood including Applicant with her mom for wood[,], berr[ies], trapping[,], and] hunting[.]

(Undated statement of Carlson (Ex. 25 attached to SOR) at 1 (emphasis added).) We simply find no evidence that Smith, prior to April 28, 1954, when she was 6 years old and younger, performed subsistence activities on her own as an independent citizen. Nor is it enough to show that Smith performed various tasks herself, for the benefit of her family, up to the level of her ability.

Accordingly, based on the evidence before us at this time, we must conclude that Smith did not engage in independent use and occupancy prior to April 28, 1954. See United States v. Akootchook, 130 IBLA at 11. However, before the allotment application may be rejected, Appellant is entitled to a hearing as required by the court in Pence v. Kleppe, 529 F.2d at 142-43. Thus, the proper action in this case is to vacate the BLM Decision and remand the case to BLM for initiation of a Government contest. See Pedro Bay Corp., 78 IBLA 196, 200, 204 (1984).

The sole issue for adjudication in the contest proceeding will be whether Smith initiated independent use and occupancy prior to the effective date of the April 1954 Order. Appellant will bear the ultimate burden of proof, by a preponderance of the evidence, with respect to this issue. National Park Service (Lewis Vanderpool), 117 IBLA 247, 250 (1991). In the absence of an appeal to this Board, the decision of the administrative law judge deciding the contest will be final for the Department.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is vacated, and the case is remanded to BIM for initiation of a Government contest.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge